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No. 92-1531

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

CRAIG FEINSTEIN,

Petitioner,

vs.

CITY OF LOS ANGELES, et al.,

Respondents.

Petition for Writ of Certiorari
to the California Court of Appeal
Second Appellate District, Division Two

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Whether the Due Process Clause of the Fourteenth Amendment to the Constitution requires that a public employee with a vested property interest in his employment be provided a post-deprivation appeal when he has been afforded a full administrative trial prior to his removal from employment?

2. Whether it is consistent with the Due Process Clause of the Fourteenth Amendment to the Constitution for a city administrative tribunal vested by the city's Charter with authority to suspend or remove a police officer, to recommend to the Chief of Police the removal of an officer after notice to him of a disciplinary charge and a full evidentiary trial on that charge, where,

before the trial, the Chief of Police had proposed that the officer be suspended?

TABLE OF CONTENTS

	PAGE
Counter Statement of Questions Presented	i
I. Statement of the Case	1
II. Arguments for Denying the Petition	10
A. Petitioner Received All The Process He Was Due.	10
B. Petitioner Had Adequate Notice Of The Potential For Removal.	16

TABLE OF AUTHORITIES

CASES	PAGE
Armstrong v. Manzo 380 U.S. 545, 552, 14 L.Ed.2d 62, 85 S.Ct. 1187 (1965)	15
Boddie v. Connecticut 401 U.S. 371, 28 L.Ed.2d 113, 91 S.Ct. 780 (1971)	10,12,13 15
Cleveland Board of Education v. Loudermill 470 U.S. 532, 84 L.Ed.2d 494, 105 S.Ct. 1487 (1985)	9,10,14 15
Mathews v. Eldridge 424 U.S. 319, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976)	10,13
Mullane v. Central Hanover Bank & Trust Co. 339 U.S. 306, 94 L.Ed 865, 70 S.Ct. 652 (1950)	10,12,16
Paoli v. Civil Service Commission of Mendocino County 12 Cal.App.4th 1073, 15 Cal.Rptr.2d 874 (1993)	17,18
Skelly v. State Personnel Board 15 Cal.3d 194, 539 P.2d 774, 124 Cal.Rptr. 14 (1975)	11

STATUTES	PAGE
California Code of Civil Procedure	
Section 1094.5	2
CHARTER	
Los Angeles City Charter	
Section 202	3,13
Section 202(2)(b)	6
Section 202(12)	7,16,17

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I.

STATEMENT OF THE CASE

In Craig Feinstein v. City of Los Angeles, et al., the California Court of

Appeal upheld the judgment of a Superior Court of Los Angeles County denying a petition for writ of administrative mandate sought by petitioner under California Code of Civil Procedure § 1094.5. The petition requested that a writ be issued ordering the Chief of Police of the Los Angeles Police Department to set aside the termination of petitioner's employment as a police officer on the basis that petitioner had been denied due process. The decision to remove petitioner had been made by the Chief of Police upon the recommendation of a Police Department administrative tribunal (the "Board of Rights") after a full evidentiary trial on a charge of which petitioner had notice and against which he defended.

The tribunal, convened at the request of petitioner, acted pursuant to

the authority vested in it by § 202 of the Charter of the City of Los Angeles.[1]

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[1]Section 202 provides a very detailed procedure for the discipline and removal of police officers, from a provision for notice to the affected officer to a provision for rehearing. The subsections of § 202 pertinent to this petition follow:

> Section 202:
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> "(1) . . . No officer or employee of the Police Department shall be suspended, removed, deprived of his office or position, or otherwise separated from the service of the Police Department (other than by resignation), except for good and sufficient cause shown upon a finding of "guilty" of the specific charge or charges assigned as cause or causes therefor after a full, fair and impartial hearing before the Board of Rights . . . .
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> (2) Provided, however, that the Chief of Police may:
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> . . .
>
> (b) Suspend such officer or employee for a total period not to exceed

(continued...)

[1](...continued)
thirty (30) days with loss of pay and with or without reprimand, subject, however, to the right of such officer or employee to a hearing before a Board of Rights.

. . .

(12) . . . The said Board of Rights shall, at the conclusion of the hearing, make its specific findings of "guilty" or "not guilty" (on each specific charge) which must be based upon the evidence adduced before it at such hearing and not otherwise and render and certify its decision in writing. . . . In case, however, that the accused is found "guilty," the said Board of Rights shall prescribe its penalty (by order in writing) of either suspension for a definite period not exceeding six (6) months with total loss of pay, and with or without reprimand; or reprimand without further penalty; or of removal from office or position; which decision and order must be certified in writing and a copy thereof immediately delivered to the Chief of Police. . . .

(continued...)

Prior to the trial, petitioner had been served with a specific charge of misconduct, had been provided the investigative materials on which the charge was based and had been given an opportunity, of which he availed himself, to be heard on the charge at a meeting with his captain, a delegate of

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[1](...continued)

> (13) The Chief of Police shall thereafter execute the order of the Board of Rights within five (5) days after delivery to him of such certified copy of decision and order or, he may within five (5) days at his discretion and in lieu of such order, impose a penalty upon such officer or employee less in severity than that ordered by the Board of Rights, but may not impose a greater penalty. . . ."

See petitioner's Appendix I for the full text of Charter § 202.

the Chief of Police.[2] After the meeting, the captain recommended petitioner be suspended for ten days. The Chief of Police accepted the recommendation and notified petitioner that he was to receive a ten day suspension without pay. The suspension was never served however, because before the date set for its imposition, petitioner exercised his right under § 202(2)(b) to request a full hearing by a police department Board of Rights on the charge against him.

The Board held a two day evidentiary hearing at which petitioner was represented by a defense representative of his choice. He

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[2]These and the facts which follow are contained in the decision of the Court of Appeal, petitioner's Appendix A.

produced a witness on his behalf and cross-examined witnesses against him on the issue of his guilt or innocence of the charge. He did not produce any witnesses to speak on his behalf during the penalty phase of the hearing after his guilt had been determined.[3] At the conclusion of the hearing, pursuant to its authority under § 202(12), the three member Board announced that it was recommending to the Chief of Police that petitioner be removed from his position as a police officer. The recommendation was adopted by the Chief of Police and

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[3]The opinion of the Court of Appeal seems to suggest that petitioner refused to produce any witnesses at any time during the hearing. Since one of petitioner's issues on appeal was his alleged lack of notice of the potential increase in penalty, his focus, and that of the opinion of the court, was only his failure to produce character witnesses during the penalty phase of the hearing.

petitioner was subsequently terminated from his employment. Petitioner challenged the process by which he was removed as constitutionally defective, asserting that the Board of Rights increased his disciplinary penalty without providing him with either notice of that potentiality or a subsequent hearing. He is now challenging the Court of Appeal decision which upheld both the process and his removal.

In his petition to this Court, petitioner characterizes his Board of Rights hearing as an appeal from the initial decision of the Chief of Police to suspend him for ten days and challenges the Board's authority to recommend his removal. In fact, the hearing was a de novo trial at which the Board members adduced testimonial and documentary evidence that had not been

before the Chief of Police when he made his first penalty decision and at which no reference was made to the investigatory evidence that had been before the Chief of Police at that time. Thus, petitioner mischaracterizes his Board of Rights trial as an appeal from a property interest deprivation, when, in reality, it was a hearing prior to a property interest deprivation.

This mischaracterization is crucial to petitioner's challenge to the decision of the Court of Appeal. When the Board of Rights trial is properly recast as a pre-deprivation hearing, it is apparent that the Court of Appeal decision is wholly consistent with this Court's body of authority on pre-deprivation due process. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 84 L.Ed.2d 494, 105 S.Ct. 1487

(1985); Mathews v. Eldridge, 424 U.S. 319, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976); Boddie v. Connecticut, 401 U.S. 371, 28 L.Ed.2d 113, 91 S.Ct. 780 (1971); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 94 L.Ed 865, 70 S.Ct. 652 (1950). For that reason, review by this Court is not warranted and certiorari should be denied.

II.

ARGUMENTS FOR DENYING THE PETITION

A. Petitioner Received All The Process He Was Due.

Prior to being terminated from his employment, petitioner was notified of the disciplinary charge against him, was provided a copy of the investigative materials on which the charge was based,

and availed himself of the opportunity to be heard by a delegate of the Chief of Police. Skelly v. State Personnel Board, 15 Cal.3d 194, 539 P.2d 774, 124 Cal.Rptr. 14 (1975). As a result of that process, the Chief of Police decided to suspend petitioner for ten days. Petitioner, however, chose to exercise an option given to police officers under the Charter of the City of Los Angeles - to reject the discipline meted out by the Chief and to take his chance at a better result from a department Board of Rights.

Thereafter, a Board convened and conducted a two day evidentiary hearing at which petitioner was represented, produced and cross-examined witnesses, and introduced and challenged documentary evidence. At the conclusion of the hearing, based on what it had

seen and heard, the Board of Rights recommended that petitioner be removed. The Chief of Police acted on the Board's recommendation and petitioner was terminated from his employment. Petitioner is now before this Court because he took his chance with a Board of Rights, and lost.

Due process requires that a deprivation of life, liberty or property "be preceded by notice and an opportunity for hearing appropriate to the nature of the case." Mullane v. Central Hanover Bank & Trust Co., supra, at 313. The essence of due process is the opportunity to be heard before a property deprivation, but the extent of the pre-deprivation hearing is determined by the importance of the interests involved and the nature of the subsequent proceedings. Boddie v.

Connecticut, supra. The interests involved in the deprivation of a public employee's employment are the private interest of the employee in retaining employment, the government employer's interest "in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of an erroneous termination." Mathews v. Eldridge, supra, at 335.

When it enacted Charter § 202, the City of Los Angeles chose to balance the competing interests of a public employer and its employees in favor of its employees, providing police officers with a full hearing before they are permanently deprived of any property interest in their employment.[4] In his

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[4]A provision of § 202 permits, under certain circumstances, the temporary relief from duty of an officer (continued...)

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first claim of constitutional deficiency petitioner asserts that notwithstanding the nature and extent of his pre-deprivation hearing, due process entitles him to a post-deprivation hearing as well. In support of his position, he cites Cleveland Board of Education v. Loudermill, supra.

In Loudermill, this Court established the extent of pre-deprivation process a public employer must give an employee who has a property interest in employment, holding that notice and an opportunity to be heard is sufficient so long as a post-deprivation hearing is held within a reasonable time

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[4](...continued)
pending a Board of Rights hearing. Petitioner, however, was not deprived of any salary or other property interest in his employment prior to his Board of Rights hearing.

thereafter. The extent of pre-deprivation process an employer may give an employee was not an issue in Loudermill or in any other case of which respondents are aware since it is the lack of pre-deprivation process and not its provision that creates a constitutional hazard. Boddie v. Connecticut, supra. Due process requires a hearing "at a meaningful time in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552, 14 L.Ed.2d 62, 85 S.Ct. 1187 (1965). Petitioner exercised his right to be heard, in full, before a final decision was made to terminate his employment. That is all the process this Court has ever held is due. Since the Court of Appeal decision petitioner is challenging is entirely consistent with Loudermill and the long line of cases which comprise

this Court's body of law on pre-deprivation due process, review is not merited and certiorari should be denied.

B. Petitioner Had Adequate Notice Of The Potential For Removal.

If the essence of due process is the opportunity to be heard before being deprived of a property interest, the key to a constitutionally sufficient hearing is adequate notice. Mullane v. Central Hanover Bank & Trust Co., supra. Petitioner's second claim of constitutional deficiency is that the failure of the Board of Rights to fix his penalty before his hearing created a fatal lack of notice of the potential for removal.

Section 202(12) empowers a Board of Rights, upon a finding of guilt of any

charge against an officer, to "prescribe its penalty . . . of either suspension for a definite period not exceeding six (6) months with total loss of pay, and with or without reprimand; or reprimand without further penalty; or of removal from office or position . . . ." (Emphasis added.) The specific enumeration of penalty options in § 202(12) is contrasted with the language in the Civil Service Ordinance in Paoli v. Civil Service Commission of Mendocino County, 12 Cal.App.4th 1073, 15 Cal.Rptr.2d 874 (1993) which permitted the Mendocino County Civil Service Commission to "modify" a previously imposed disciplinary order. The California Court of Appeal, in a two to one decision, found that "modification" did not encompass changing the nature of

the punishment from suspension to discharge.

Petitioner cites Paoli at length in support of his contention that it offends the Constitution for an employer to impose a termination on an employee's appeal from a lesser penalty. Petitioner's reliance on Paoli is inapt. First, the Paoli court indicated that the Constitution would not have been offended had the Mendocino Civil Service Commission imposed a termination on Mr. Paoli's appeal from his suspension had Mr. Paoli been adequately notified of that possibility. Second, petitioner's Board of Rights hearing, unlike Mr. Paoli's hearing, was not an appeal from a lesser penalty, but a de novo pre-deprivation hearing. (See discussion, supra.) And third, petitioner, unlike Mr. Paoli, had adequate notice of the

authority of the Board of Rights to remove him.[5]

The Court of Appeal decision which upholds the process by which petitioner was terminated does not raise any issue of constitutional dimension for this Court's consideration. Respondents

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[5]Additionally, if, in fact, two districts of the California Court of Appeal have issued conflicting decisions regarding public employees' due process rights, the California Supreme Court should render its decision on the issue before this Court considers the necessity of granting review.

respectfully request that the petition for certiorari be denied.

Dated: April 13, 1993

Respectfully submitted,

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